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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FRANK J. MARCONE,

Petitioner,

—vs.—

PENTHOUSE INTERNATIONAL, LTD.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent Penthouse International, Ltd. ("Penthouse") respectfully requests that this Court deny the petition for a writ of certiorari filed by petitioner Frank J. Marcone to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

REASONS FOR DENYING THE WRIT

I.

THE PROCEDURAL ISSUES COMPLAINED OF BY PETITIONER WERE WAIVED, AND PETITIONER MISCHARACTERIZES THE OPINION OF THE COURT OF APPEALS IN ORDER TO RAISE "IMPORTANT QUESTIONS" WHICH WERE NOT PART OF THE DECISION BELOW

Petitioner urges that the Court of Appeals decided that he was a limited purpose public figure on the basis of inadmissible

hearsay evidence, that he was deprived of a right to jury trial on disputed issues of fact concerning his public figure status and that the burden of proving that status was incorrectly placed upon him.

As demonstrated below, however, petitioner deliberately misreads the Court of Appeals decision in an effort to frame important legal questions for review by this Court which do not arise at all in this case. In any event, petitioner failed to preserve his right to complain about these procedural matters—which are being raised for the first time here—since he did not raise these arguments to either the District Court or the Court of Appeals. In short, based on the record, this case does not present an appropriate occasion for this Court to consider questions relating to the method of proof, the burden of proof or the right to a jury trial concerning plaintiff's status as a public figure.

A. Petitioner Waived the Right to Contest These Procedural Matters

Petitioner failed to preserve any objection with respect to the burden of proof on the public figure question, the use of alleged hearsay evidence or the right to a jury trial on disputed factual issues related to his public figure status.

Although the District Court determined prior to the time of trial that Marcone was a private figure, it repeatedly emphasized that its decision was made "on the basis of the present record." (App. at 65). Petitioner was therefore fully aware that his public figure status was still a critical issue which Penthouse would press on appeal, and the District Court's own limitation to the facts then before it invited Penthouse to more fully develop the factual record at trial regarding the public figure issue.

But in opposing Penthouse's motion for summary judgment before the District Court, Marcone never objected to the use of newspaper articles on the ground of hearsay. Moreover, in his brief opposing Penthouse's appeal to the Third Circuit, Mar-

cone failed to argue that the record contained inadmissible hearsay and he never raised the issues concerning burden of proof and right to a jury trial belatedly urged for the first time before this Court.[1]

It is submitted that petitioner waived these procedural arguments by not preserving them below. Even if petitioner contends that these procedural issues rise to a level of constitutional magnitude, "it is equally clear that even constitutional objections may be waived by a failure to raise them at a proper time . . ." *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 143 (1967); *Michel v. Louisiana,* 350 U.S. 91, 99 (1955). It would be particularly inappropriate for this Court to exercise its discretion to decide what petitioner characterizes as "important questions" on the basis of a record totally undeveloped and devoid of any analysis by the parties or the lower courts addressing these issues. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 37 (1976) (it was inappropriate to review the statutory and constitutional questions raised, "[p]articularly in the absence of any mention of the regulations in the opinion and judgment of the District Court, or in the briefs and oral arguments of the parties, . . ."); *Accardi v. Pennsylvania Railroad Co.*, 383 U.S. 225, 233 (1966) ("The record before us does not present that question with sufficient clarity for us to pass upon it"); *Public Affairs Associates, Inc. v. Rickover,* 369 U.S. 111, 113 (1962) ("Adjudication of such problems . . . should rest on an adequate and full-bodied record. The record before us is woefully lacking in these requirements.").

B. The Court of Appeals Did Not Shift the Burden of Proving Public Figure Status From the Defendant to the Plaintiff

The burden of proof issue is a straw man raised by the petitioner in order to attract the Court's attention to an

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1 In the public figure section of his brief to the Third Circuit (p. 14), Marcone did note the "litany of news articles" received in evidence, but did not object to consideration of those articles on the ground of hearsay.

unresolved procedural question of importance. But while the question may be interesting, it has no bearing upon this case. The legal question of allocating the burden of proving plaintiff a public figure is not at issue since there is nothing in the decision of the Court of Appeals to suggest that it relieved defendant of the burden of proof and shifted it to the plaintiff. Indeed, it would be anomalous for the Court of Appeals to have done so, since the burden of proving the facts giving rise to a privilege invariably rests upon the party asserting the privilege—in this case the defendants. Petitioner fails to point out any language in the Court of Appeals opinion to support his contention that the burden was placed upon him. What he actually does is to argue that his interpretation of the evidence warrants a different result. Certainly, this Court should not be called upon simply to decide whether the evidence in this case was sufficient to support the Court of Appeals' determination that plaintiff was a limited purpose public figure.

C. Plaintiff's Public Figure Status Was Not Decided on the Basis of Hearsay

The flaw in petitioner's argument is that the newspaper articles relied upon by the Court of Appeals do not constitute hearsay, because they were not used for the truth of the statements contained therein, but rather for the general notoriety and attention attracted by Marcone in the limited context of illicit drug trafficking. See, e.g., *Rebozo v. The Washington Post Company*, 637 F.2d 375 (5th Cir. 1981); *Waldbaum v. Fairchild Publications, Inc.* 627 F.2d 1287 (D.C. Cir. 1980); *Rosanova v. Playboy Enterprises, Inc.*, 411 F. Supp. 440 (S.D. Ga. 1976), *aff'd*, 580 F.2d 859 (5th Cir. 1978). These cases as well as many others establish that the public perception of the fame of a libel plaintiff, as reflected in media reports, constitutes appropriate evidence to support a determination that he is a public figure.[2] In fact, it is almost impossible to prove public figure status without the use of media reports.

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2 A person may be "drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." *Gertz v. Welch, Inc.*, 418 U.S. 323, 351 (1974).

Significantly, in the libel cases previously decided by this Court, precisely the same kind of evidence has been considered as to public figure status, *Wolston v. Reader's Digest Assn., Inc.*, 443 U.S. 157, 162-63 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111, 134 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448, 484 (1976) (Marshall, J., dissenting). While each of those cases ultimately held the plaintiff to be a private figure, this Court's discussion of and consideration of media reports indicates that such proof was appropriately received on the public figure issue, whatever the outcome. For example, in *Wolston v. Reader's Digest Assn., Inc., supra*, this Court observed that Wolston's conduct "attracted media attention", 443 U.S. at 167, noting that "at least seven news stories focusing on petitioner's failure to respond to the grand jury subpoena appeared in New York and Washington newspapers", *id.* at 162, and "[n]ewspapers also reported the details of the contempt proceedings and petitioner's guilty plea and sentencing", *id.* at 163. Although the Court concluded that Wolston was a private figure, it did not reject as hearsay the media reports concerning his activities.

D. There is no Right to a Jury Trial on Subsidiary Factual Issues Relating to Public Figure Status

Like any legal defense which is to be decided by the court, e.g., the statute of limitations or proper service of process, in reaching its legal conclusion the court necessarily makes certain factual determinations, even where specific factual questions may be disputed. The petitioner cites no authority to support his novel contention that every subsidiary factual dispute requires resolution by a jury. In fact, the courts that have addressed the question hold that the public figure determination presents a question of law. *Rosenblatt v. Baer*, 383 U.S. 75, 88 (1966). (See authorities cited at App. at 16 n.4).

In this case, the issue of fact, if any, was not the truth of petitioner's various activities in the drug culture, but the existence of numerous newspaper articles linking him with the Castle and the criminal activities that occurred there. Such

articles clearly existed whether or not their contents were accurate. Furthermore, there is nothing in the record to suggest that the Court of Appeals relied upon any material issue of disputed fact in order to arrive at its conclusion that Marcone was a limited purpose public figure.

II.

THE COURT OF APPEALS PUBLIC FIGURE ANALYSIS IS ENTIRELY CONSISTENT WITH APPLICABLE DECISIONS OF THIS COURT

A. The Court of Appeals Did Not Rely Solely on Petitioner's Indictment to Find Him a Public Figure

In finding Marcone to be a public figure, the Court of Appeals was careful to stress the narrow ambit of its holding: "This decision is tied to the facts of this case." (App. at 27 n.11). The public figure holding resulted from "a mix of factors leading to that classification" (App. at 24) and only "when all the relevant factors are considered in context and as a whole" (App. at 26).

The Court of Appeals did not solely rely upon Marcone's 1976 indictment in a billion dollar drug trafficking ring to find him a public figure, but considered that fact as only one of several elements (App. at 24). Accordingly, the Court of Appeals did not act inconsistently with this Court's decisions in *Firestone* and *Wolston*, but instead recognized that alleged participation in criminal activity does not automatically make a libel plaintiff a limited purpose public figure. (App. at 23).

This Court has never prohibited consideration of an indictment as a factor to be evaluated in determining public figure status. The Court of Appeals did not accept the indictment as establishing the truth of the allegations therein, but instead pointed to it, and its attendant widespread publicity, as an example of the public attention attracted to Marcone in connection with drug smuggling—the very subject matter of the Penthouse article.

Rather than stressing the fact of Marcone's indictment, the Court of Appeals analyzed "the nature and extent of Marcone's participation in drug activities." (App. at 22). The Court of Appeals looked beyond the indictment to Marcone's close connections with the Castle, "a large mansion in Delaware County which served as the headquarters for the Pagans motorcycle gang" and which was linked with numerous illegal activities "including drugs, stolen goods, and the disappearance and suspected murder of five young women," to the relationship between "the Pagans and their illegal drug activities to the two billion dollar drug-smuggling ring brought to light by the Detroit indictment" (App. at 24), and to Marcone's meetings with the Pagans and other drug dealers at the gang's headquarters and his "going on occasional weekend trips with motorcycle gang members" (App. at 25).[3]

Furthermore, petitioner grossly overstates his case when he argues that when the Court of Appeals identified drug trafficking as the relevant public controversy for its public figure analysis, it "flouted the authority of this Court by intentionally deciding the point in direct conflict with this Court's decision in *Wolston*" (Petition, p. 14). There, this Court stated that "there was no public controversy or debate in 1958 about the desirability of permitting Soviet espionage in the United States;" 443 U.S. at 166 n.8, but instead referred to the public controversy "surrounding *the investigation* of Soviet espionage in the United States" *id.* at 166 (emphasis added). As the Court of Appeals concluded: "Drug trafficking of such mammoth proportions, which is one of the most troubling issues of our time, surely falls within the ambit of public controversy." (App. at 19). Although "all responsible United States citizens" oppose Soviet espionage, there is considerable debate concerning the legalization of marijuana as a solution to end illicit

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3 Evidence at trial indicated that Marcone had filed three libel lawsuits against the local newspapers which reported his illicit activities, claiming that the stories were false and defamatory; but Marcone insisted that he voluntarily allowed all three cases to terminate because they were not "viable".

smuggling. The Penthouse article was entitled "The Stoning of America," subtitled "Marijuana is now big agribusiness—a $12 billion a year corporate growth crop" and mentioned Frank Marcone as an example of the educated professional businessman or attorney who has taken over drug peddling from "the hippy dope-dealers of the 1960's counterculture" and who has been frustrating extensive governmental investigations by avoiding being sentenced to prison.

B. The Court of Appeals Did Not Hold that Petitioner's Representation of Clients Rendered Him a Limited Purpose Public Figure

As noted above, the Court of Appeals considered a "mix of factors" (App. at 24) in reaching the conclusion that Marcone was a public figure for the limited purpose of his connection with illicit drug trafficking. But one factor the Court of Appeals expressly downplayed was Marcone's representation of notorious hoodlums and drug dealers (App. at 24-25). The Court of Appeals stressed that it "may give only limited significance to Marcone's representational activities in the public figure analysis" (App. 25), and the context of its discussion on this point indicates that it was more concerned with addressing Penthouse's argument in order to deemphasize the significance of Marcone's activities as an attorney rather than to place any weight upon that factor in finding Marcone to be a public figure.

III.

THE FINDING OF NO MALICE BY THE COURT OF APPEALS WAS ENTIRELY CONSISTENT WITH THE DECISIONS OF THIS COURT AND THOSE OF OTHER CIRCUITS

The Court of Appeals independently reviewed the facts relating to the actual malice question, as required by this Court's decision in *Bose Corp. v. Consumers Union*, 104 S. Ct. 1949, 1965 (1984);

> "The requirement of independent appellate review reiterated in *New York Times v. Sullivan* is a rule of federal constitutional law. It emerged from the exigency of deciding concrete cases; it is law in its purest form under our common law heritage. It reflects a deeply held conviction that judges—and particularly members of this Court—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution. The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice'."

The Court of Appeals correctly held that clear and convincing evidence of actual malice was lacking, and there was absolutely no proof to show that Penthouse "in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). To the contrary, the Court of Appeals found that Penthouse reasonably relied upon the reputation of the author, who was known to the Penthouse editors as a "very professional investigative

journalist" (App. at 32), upon "a copy of the Detroit indictment that charged Marcone with the crime for [sic] which the article stated he committed" (App. at 33-34), upon "an article from the *Philadelphia Inquirer*, dated March 18, 1976, which reported on Marcone's indictment" (App. at 34), and upon "a report of a hearing on illicit Mexican-American drug traffic before a Senate Subcommittee" (App. at 35). All of this research and verification was accomplished by Penthouse in connection with a fleeting reference to Marcone in two brief sentences of a 5000 word article, Marcone being only one of eight examples of attorneys involved in drug trafficking who escaped criminal sentences. The Court of Appeals stated that "based on an independent review of the record we conclude that the plaintiff failed to prove, either by clear and convincing evidence or even by a preponderance of the evidence, that the libelous statement was published with actual malice." (App. at 36-37). The legal question presented by petitioner as to whether all permissible inferences are to be resolved in his favor[4] during appellate review of the actual malice question simply does not arise in this case because even under petitioner's theory the evidence is constitutionally deficient to support a finding of actual malice.

The finding of no actual malice was not reached by viewing the evidence in the light most favorable to Penthouse, as erroneously urged at pp. 19-20 of petitioner's brief, and there is nothing in the opinion of the Court of Appeals to suggest that it undertook such an approach. Moreover, petitioner's argument that Penthouse failed to come forward with affirmative evidence explaining how the Senate Subcommittee footnote was misread[5] is an attempt to shift the burden of proving

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4 Petitoner cites *Tavoulareas v. The Washington Post Company*, 759 F.2d 90 (D.C. Cir., 1985), but on June 11, 1985 the Court of Appeals vacated its April 9, 1985 decision and granted the defendants' Petition for a Rehearing En Banc.

5 The Penthouse article stated that "[c]harges against him were dismissed because he cooperated with further investigations", whereas the actual footnote of the Senate Subcommittee report that applied to Marcone stated "[d]ismissed (to be reindicted in Philadelphia)."

actual malice by clear and convincing evidence away from the libel plaintiff and to unconstitutionally require the publisher to explain to the jury's satisfaction every aspect of the editorial and verification process upon penalty of punitive damages.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Dated: June 27, 1985

Respectfully submitted,

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